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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [illegible]6. 4

SEABOARD AIR LINE RAILWAY COMPANY,
APPELLANT,

VS.

A. W. WATSON, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

JOHN E. MATHEWS,
H. M. TAYLOR,
Counsel for Appellee.

INDEX

Subject Index

Official Report Below 1

Jurisdiction 1

Statement of Case 5

Specifications of Assignment of Errors 6

Argument 7-26

- Summary of Facts 7
- Points of Fact 8
- Points of Law 9
  - First Point of Law 9
  - Second Point of Law 17
  - Third Point of Law 23
  - Fourth Point of Law 24
  - Fifth Point of Law 25

Conclusion 26

Table of Cases Cited

Baltimore & Ohio R. R. Co. vs. Goodman, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24 ..... 4, 8, 25

Detroit, Ft. Wayne & Bell Isle Ry. Co. vs. Osbourne, 189 U. S. 383, 23 Sup. Ct. Rep. 540, 47 L. ed. 860 19

Dow vs. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. ed. 841 20

Fla. C. & P. R. Co. vs. Foxworth, 41 Fla. 1, 25 So. 338 13

F. E. C. Ry. Co. vs. Carter, 67 Fla. 335, 65 So. 254 14

Lewter vs. Tomlinson, 54 Fla. 215, 44 So. 935.... 14

Lindsley vs. National Carbonic Gas Co., 220 U. S. 61, 315 Sup. Ct. Rep. 337, 55 L. ed. 369, Ann. Cas. 1912C, 160 18

Mayer vs. Wilkins, 37 Fla. 244, 19 So. 632 14

Minneapolis & St. Louis Ry. Co. vs. Emmons, 149 U. S. 364, 13 Sup. Ct. Rep. 870, 37 L. ed. 769.. 19

Missouri, K. & T. R. Co. vs. May, 194 U. S. 267, 24 Sup. Ct. Rep. 638, 48 L. ed. 971 20

Mobile & K. C. R. Co. vs. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31 Sup. Ct. Rep. 136 .....3, 12

N. O. & G. N. R. Co. vs. Walden, 160 Miss. 102, 133 So. 241 14

N. Y. etc. R. Co. vs. N. Y., 165 U. S. 628, 17 S. Ct. Rep. 418, 41 L. ed. 853 20

Orient Insurance Co. vs. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552 20

St. Louis & S. F. Ry. Co. vs. Mathews, 165 U. S. 1, 17 Sup. Ct. Rep. 243, 41 Law ed. 611 19

Savannah T. & I. of H. Ry. vs. Savannah, 198 U. S. 392, 25 Sup. Ct. Rep. 690, 49 L. ed. 1097 22

S. A. L. Ry. Co. vs. Fountain, 173 Ga. 593, 160 S. E. 789 14

S. A. L. Ry. Co. vs. Moseley, 53 So. 718, 60 Fla. 186 10

S. A. L. Ry. Co. vs. Thompson, 48 So. 750, 57 Fla. 115 10

S. A. L. Ry. Co. vs. Watson, 137 So. 719, ... Fla. 1

Southern Pines Co. vs. Powell, 48 Fla. 154, 37 So. 570 14

State vs. Beardsley, 94 So. 660, 84 Fla. 109..... 9

State ex rel. vs. Burr, 84 So. 61, 79 Fla. 290..... 9

Western & Atlantic Ry. Co. vs. Henderson, 279 U. S. 639, 73 L. ed. 884, 49 Sup. Ct. Rep. 445, 2, 10, 11, 18

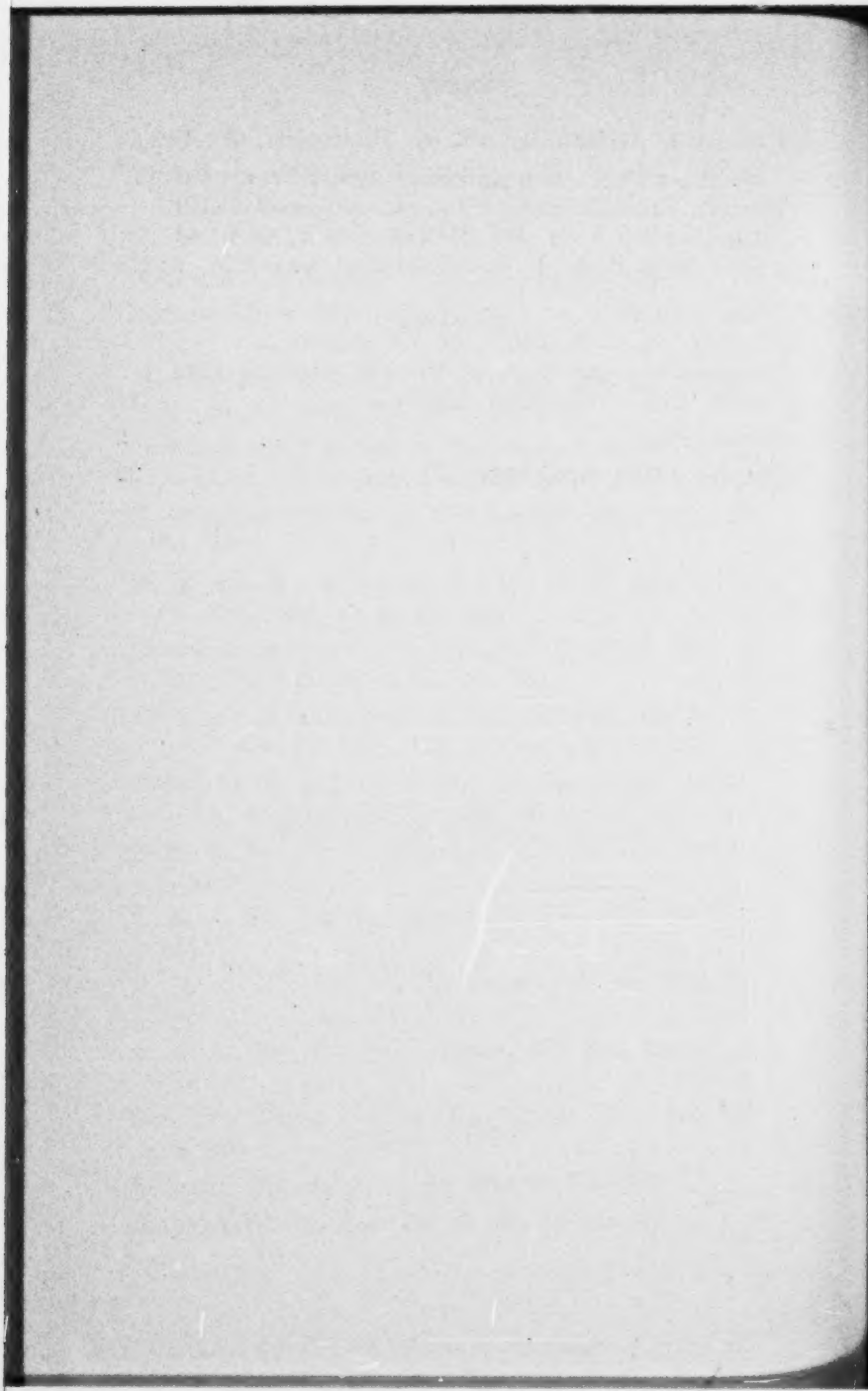
Western Union Telegraph Co. vs. Commercial Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 44 L. ed. 1088, 36 L. R. A., U. S. 220, 21 Ann. Cas. 815.... 18

STATUTES

Compiled General Laws of Florida, Sections 1290, 1294, 1296, 1319, 1320, 1324 21

Section 7051 2

Chapter 13700, Acts 1929 22



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 706.

SEABOARD AIR LINE RAILWAY COMPANY, APPELLANT,

VS.

A. W. WATSON, APPELLEE.

OFFICIAL REPORT BELOW.

The opinion delivered by the Supreme Court of Florida in the case appears reported as

Seaboard Air Line Railway Company v. *Watson*, 137 So. 719. Official Florida Reports Volume and page not yet published. Transcript pages 54-61, 66.

JURISDICTION.

The appellant in its brief invokes the jurisdiction of this Court, contending that it has been deprived of the equal protection of the law in violation of the

Fourteenth Amendment to the Constitution of the United States in four particulars:

(a) It is contended that Section 7051, Compiled General Laws of Florida, 1927, which reads as follows:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,"

is unconstitutional under the rule laid down in the case of:

> *Western & Atlantic Railroad Company* v. *Henderson*, 279 U. S. 639, 73 L. Ed. 884, 49 Sup. Ct. Rep. 445.

This contention is based largely upon the erroneous premise adopted by appellant:

> "Appellant by its evidence overcame any reasonable *prima facie* rule of evidence raised by proof only of injury and damage" (Appellant's Brief p. 3).

This premise is not supported by the evidence.

This argument also fails to take into consideration the difference in the construction of the Florida Statute adopted in the case at bar and the construction of the Georgia statute adopted in the Henderson case. Appellee contends that the Florida Statute as construed

in this case is in complete harmony with the decision of this Court in the case of:

Mobile & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 31 Sup. Ct. Rep. 136.

This will be discussed more fully under the assignments of error.

(b) It is contended that the statute offends against the Fourteenth Amendment in that it applies to railroad companies who are common carriers, but does not apply to common carriers using motor vehicles as their means of transportation, and in that it does not apply to private individuals who are not common carriers who use private railroads in the conduct of their private business.

The Florida statute above quoted as construed by the Supreme Court of the state does not apply to railroads which are not common carriers. The Court judicially knows that this class is limited to short lines operated in connection with saw mills, mines and industrial plants and that such railroads operate under essentially different conditions from those under which the great common carrier railroad systems of the country operate. We submit that there is a reasonable ground for classification of railroads which are public utilities operating as common carriers as a separate class distinct from common carriers by motor vehicles and as distinct from privately operated railroads.

This point will also be more fully discussed under the assignments of error.

(c) That the trial court refused to charge the jury in accordance with the principle of law laid down by this Court in the case of

> *Baltimore and Ohio Railroad Company* v. *Goodman,* 275 U. S. 66, 72 L. Ed. 167, 48 Sup. Ct. Rep. 24,

and thus deprived the appellant of due process of law. That case was one originating in the Federal Courts and was reversed upon the facts and no question of constitutional law was raised, and the evidence seems to have been essentially different from that and the case at bar and the Court decided no question of constitutional law in its ruling. The only matter which the Court can consider on this appeal in the case at bar is whether or not appellant's constitutional rights have been invaded in this case.

We submit, however, that the Court in its general charge (R. 38) charged the jury substantially in accordance with this decision and its charge in this connection has received the approval of the Supreme Court of Florida. There is certainly evidence sufficient to support a finding that the appellant's servants were negligent and the lower court held that appellee's servant was negligent and required an apportionment of the damages between the two under the Florida Statute of comparative negligence.

(d) The fourth ground upon which appellant claims this Court has jurisdiction is but a repetition of the first, and we respectfully refer the Court to the authorities cited thereunder and the argument hereinafter contained.

We submit that the Florida Statute being attacked and the conduct of the trial of this case in no way deprived the appellant of any constitutional right and that the appeal should be dismissed.

STATEMENT OF THE CASE.

The outline of the case as contained in appellant's brief (pages 10 to 12, inclusive), is in the main correct, but we would point out certain inaccuracies.

First: It is asserted that in the charge the Court let:

> "The jury take with it to the jury room such presumption notwithstanding the proof of the appellant tending to show that it had not been negligent in the respects complained of in the declaration."

The Court charged the jury very emphatically:

> "The presumption of negligence cast upon railroads by our statutes in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them into the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proof to remove it" (R. 40).

Thus we see that *if* the Railroad Company by its evidence relieved itself of the burden of jury that its

agents were free from negligence, the jury were charged not to take the presumption with them into their room.

Second: The evidence as to negligence on the part of appellant's employees is conflicting. The appellant's employees contradicted each other in several particulars. Their testimony is summarized by the Supreme Court of Florida in its opinion (R. 56-57), and shows that even from the testimony of appellant's own witnesses the conclusion could logically be drawn that the whistle of the train did not blow until the train was practically on the crossing and when any warning to appellee's servant came too late. This conclusion is substantiated by the testimony of appellee's witnesses as summarized by the Supreme Court of Florida (R. 57).

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assignments of error appear on pages 13 to 16 of appellant's brief and need not be recited here.

ARGUMENT.

Summary of Facts.

The testimony of the witnesses, particularly those for the appellant, is very conflicting. Some of it tends to show, as appellant urges, that the whistle of the train was blown some distance from the crossing and an emergency warning sounded just as the train arrived at the crossing.

However, looking at the testimony from another angle, it becomes apparent that this is not true. The conductor of the train, Thomas, testified, that the brakes were applied when the whistle was being sounded (R. 20). Hayes, the fireman, testified that the whistle was not blown after the crossing signal (R. 17). The engineer, Lee, was not the regular engineer on this run (R. 21). Johnson, the porter, testified that the train moved only about a train length after the brakes were applied (R. 18). The train was seven cars long and stopped with the last coach on the crossing (R. 20). From this testimony we cannot but reach the conclusion that the whistle was not sounded until the locomotive was already on or within a few feet of the crossing when any warning was too late. This is established by the appellant's own witnesses. It is also thoroughly substantiated by the direct and positive testimony of disinterested witnesses for appellee (R. 32-34, 36).

The record not only establishes the fact that the jury was justified in finding from the evidence that the

train was being operated negligently, but that such finding is sustained by the preponderance of the testimony as a whole.

In this state of the testimony, the Court charged the jury as set forth in the record, pages 37 to 42, inclusive. An examination of the charge as a whole makes it clear that the Court gave the jury a fair, impartial and unbiased charge upon which a verdict of the appellee was rendered.

Points of Fact.

In the division of appellant's brief bearing the above heading, counsel for appellant made three statements:

First: It is asserted that the case at bar is on "all fours" with the Henderson case. An analysis of the two cases which will presently be made, clearly demonstrates that the cases are not parallel.

Second: That a stronger case in favor of the railroad is made by the case at bar than was made in the Henderson case. In the following argument we will endeavor to demonstrate the error of this assertion.

Third: That the case at bar is similar to that of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. Ed. 167, 48 Sup. Ct. Rep. 24.

We have already pointed out that that case did not discuss a constitutional question but was one originating in the federal courts in which no constitutional question was raised and that the Court did in fact charge the jury in substantial accordance with the principle laid down in that decision.

POINTS OF LAW.

In addition to the assignments of error, and by way of grouping them, counsel for appellant divide the arguments into five points of law set forth on pages 22 and 23 of their brief. We will endeavor, in order that the brief may correspond as near as practicable, to follow the same order in presenting our argument.

FIRST POINT OF LAW.

Does the Statute Deny Appellant and Those Likewise Situated (Railroad Companies) the Equal Protection of the Law Because It Requires Companies to Carry Throughout the Trial a Burden Not Cast Upon Other Litigants?

Assignment of Errors No. 1, No. 2 and No. 4:

The primary question which this case presents to this Court is whether or not the Florida Statute heretofore quoted is unconstitutional as a violation of the Fourteenth Amendment of the Constitution of the United States. In approaching the construction of this statute and its application, to the case at bar, we must consider the prior decisions of the Supreme Court of Florida involving this statute, bearing in mind that:

> "The intent of a valid statute is the law and this is ascertained by a consideration of the language and purpose of the enactment." *State ex rel.* v. *Burr*, 84 So. 61, 79 Fla. 290; *State* v. *Beardsley*, 94 So. 660, 84 Fla. 109.

The statute here under consideration

> "Does not require a presumption against the company to be carried into a consideration of the evi-

dence, but only that the negligence of the defendant is presumed unless removed by a preponderance of the evidence, which is no more than the statutory burden that the company shall make it appear that it was not negligent." *S. A. L. Ry. Co.* v. *Moseley,* 53 So. 718, 60 Fla. 186.

"The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proofs by the railroad company, the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such presumption as will outweigh proofs or that will require any greater or stronger or more convincing proofs to remove them. All that the statute does in creating the presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends." *S. A. L. Ry. Co.* v. *Thompson,* 48 So. 750, 57 Fla. 155.

In the case of *Western & Atlantic Railroad Company* v. *Henderson, supra,* upon which the appellant's case is almost entirely dependent, this Court held:

"Appellee insists that Sec. 2780 is valid and argues that the presumption, being one established by a statute, has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption, that 'it should not, as a matter of law, be dissipated the instant any testimony is taken against it,' and that the issue is to be determined on a consideration of all the evidence including the presumption."

We do not contend, nor has the Supreme Court of Florida held that the presumption cast by the statute should receive any such construction as that contended for by the appellee in the Henderson case, and we think it is significant that this Court did not hold the Georgia Statute to be unconstitutional *per se*, but in rendering its decision was careful to base its decision upon the construction placed upon the Georgia Statute in that particular case, the Court said:

> "That (Statute) of Georgia *as construed in this case* creates an inference that is given the effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

Even a casual comparison of the case at bar with the Henderson case discloses that an entirely different construction was placed upon the statute by the Court in charging the jury in this case from the construction placed upon the Georgia Statute in the Henderson case. While it is true the statutes are very similar if not identical in their phraseology, yet the construction placed on that language in the two cases is so different that the rule laid down in the Henderson case is not applicable to the case at bar. It will be noted that the Court was very careful to charge the jury that if the Railroad Company meets the burden cast upon it by the statute:

> "The jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will

outweigh proof or that will require any *greater* or *stronger* or *more convincing* proof to remove it" (R. 40).

We submit that the construction of the Florida Statute as made in this case can be most aptly described by the language of this Court:

> "The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of train shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the *prima facie* case is enough as a matter of law.
>
> "The statute does not therefore deny the equal protection of the law or otherwise fail in due process of law because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of either evidence contradicting such inference." *Mobile J. & K. C. R.* v. *Turnipseed,* 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (U. S.) 26. 31 Sup. Ct. Rep. 136 Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.

It is urged by the appellant, however, that the Court should by its charge have assumed that the Railroad had met the burden of proof cast upon it by the statute and have so charged the jury in effect by refusing to charge the jury on the statute. This contention can not be sustained for two reasons:

First: The evidence by the appellant in the trial court is sufficient in itself to show negligence on the part of the railroad employees, by showing, as has been heretofore pointed out, that the whistle of the train did not blow except simultaneously with the application of the brakes and that the train moved only a distance of its length after the brakes were applied and that the last coach was on the crossing when the train was finally brought to a stop, which makes it mathematically certain that the locomotive was on the crossing when the whistle was first sounded. This not only fails to show lack of negligence, but actually shows negligence on the part of the railroad employees.

Fla. C. & P. R. Co. v. *Foxworth,* 41 Fla. 1, 25 So. 338.

At least the jury were justified in drawing this conclusion.

Second: There is another and stronger reason why the Court should not have refused to charge the jury on the statute, which is that under the decisions of the Florida Courts it is improper for a trial judge to comment upon the evidence or draw inferences from the evidence or invade the province of the jury by assuming the proof of controverted facts.

> "The Court has no right to invade the province of the jury by assuming as proven facts, matters which are in dispute upon the trial." *Fla. C. & P. R. Co.,* v. *Foxworth, supra.*

See also:

F. E. C. Ry. Co. v. *Carter,* 67 Fla. 335, 65 So. 254.

Southern Pine Co. v. *Powell,* 48 Fla. 154, 37 So. 570.

Lewter v. *Tomlinson,* 54 Fla. 215, 44 So. 935.

Mayer v. *Wilkins,* 37 Fla. 244, 19 So. 632.

Appellant relies largely upon the decision of the Supreme Court of Mississippi in the case of:

N. O. & G. N. R. Co. v. *Walden,* 160 Miss. 102, 133 So. 241.

And the Georgia case of:

Seaboard Air Line Ry. Co. v. *Fountain,* 173 Ga. 593, 160 S. E. 789.

We submit that the Walden case places the construction upon the Henderson case which is entirely unjustified. It in effect holds that the Henderson case overrules the decision of the Turnipseed case, whereas, in fact, the Henderson case clearly recognizes and approves the rule laid down in the Turnipseed case. We think the correct construction of the principle laid down in the Henderson case is found in the opinion of McGowen, J., concurred in by Cook, J.

> "I think the Henderson case is limited, both by its syllabus and opinion to the facts therein stated."

The majority opinion of the Mississippi Court in the Walden case overruled a number of decisions of that Court based upon the Turnipseed case, and the Turnipseed case itself was at least in part overruled

by the construction placed upon the Henderson case. We do not think this was justified by any part of the decision in the Henderson case.

The Georgia Court in the Fountain case places a different construction upon the Turnipseed case from that placed upon it by the Supreme Court of Mississippi in its decisions prior to the decision by this Court in the Henderson case. The charge to the jury in the Fountain case is much stronger against the railroad than the charge in the case at bar, because in the case at bar the jury were particularly charged that the presumption ceased as soon as a preponderance of the evidence made it appear that the agents of the railroad had exercised all ordinary reasonable care and diligence and in the presence of such proof:

> "The jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proof or that will require any greater or stronger or more convincing proof to remove it."

We respectfully submit that this charge brings this case clearly within the rule laid down in the Turnipseed case and that there is nothing whatever in the Henderson case holding such rule to be in violation of the Fourteenth Amendment to the Constitution.

We again call the attention of the Court to the fact that under the law of Florida a trial judge is not permitted to comment upon the evidence and can only charge the jury upon the law of the case, upon whom the burden of proving the various allegations, depend,

and upon what conditions the burden of proof shifts, and the Court in its charge can not presume any fact to have been proven where the evidence is at all conflicting and can not discuss the weight of the evidence or the probative force of the evidence. Authorities *supra.*

The Court, in this case, then very properly charged the jury as to the burden cast upon the Railroad Company by the statute and then charged them that if this burden were met by the evidence that the presumption did not go with them into their room when they went into a consideration of the case.

We submit that a proper determination of the question here presented rests upon an application of the principles laid down in the Henderson case and those laid down in the Turnipseed case. We submit that in view of the evidence and the charge of the Court in the case at bar it falls in line with the Turnipseed case, and that the decision of this Court in that case is applicable and the statute should not be held to be unconstitutional.

It is next contended under the same heading in appellant's brief, that the statute is unconstitutional because it does not apply to those railroad lines operated in connection with private business enterprises while it does apply to railroad companies that are common carriers.

As we have pointed out, the Court will take judicial notice of the fact that such railroads as are used in connection with private enterprises, sawmills, mines and industrial plants are short and the use of these

roads is essentially different and the traffic over these roads is essentially different in type and operate from the use of and traffic upon the great railroad systems of Florida and of the country as a whole.

It is also urged that the law is unconstitutional in that it does not apply to common carriers who use motor vehicles as their means of transportation.

These points bring up the question of legislative classification for the purpose of regulation under the police powers of the state and so fall more logically under the Second Point of Law urged by appellant, and they will be discussed and the authorities will be cited under a discussion of appellant's Second Point of Law.

SECOND POINT OF LAW.

Is the Statute Invalid and Discriminatory in That It Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Not Imposed Upon Motor Carriers for Hire?

Assignment of Error No. 3:

The question here presented is whether or not the classification of railroads, which are common carriers and public utilities apart from those private lines which are not common carriers, but are a mere adjunct to some other business, and apart from common carriers who use motor vehicles as their means of transportation is in violation to the Fourteenth Amendment to the Federal Constitution.

> "The rules by which this contention must be tested, as is shown by repeated decisions of this Court are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the

state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U. S. 36, 41, 27 S. Ct. 243, 51 U. S. (L. ed.) 357; *Louisville, etc. R. Co.* v. *Melton*, 218 U. S. 36, 30 S. Ct. 676, 54 U. S. (L. ed.) 921; *Ozan Lumber Co.* v. *Union County Nat. Bank*, 207 U. S. 251, 256, 28 S. Ct. 89, 52 U. S. (L. ed.) 195; *Munn* v. *Illinois*, 94 U. S. 113, 132, 24 U. S. (L. ed.) 77; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 615, 19 S. Ct. 553, 43 U. S. (L. ed.) 823." *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 315 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

A statute making it unlawful for telegraph companies to, by contract, limit liability for negligent failure to deliver a telegram without similarly restricting express companies and other common carriers, does not deny telegraph companies equal protection of the law or due process of law.

Western Union Telegraph Company v. *Commercial Milling Company*, 218 U. S. 406, 31 S. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. N. S. 220, 21 Ann. Cas. 815.

A statute making railroad companies liable for all damages sustained because of failure to fence their railroad tracks including reduction in value of the adjoining land by reason of the lack of such fences, does not deprive the railroad company of equal protection of the law or take its property without due process of law, since no discrimination is made against any particular railroad company or corporation and all are treated alike and required to perform the same duty.

Minneapolis and St. Louis Railway Company v. *Emmons*, 149 U. S. 364, 13 Sup. Ct. Rep. 870, 37 L. Ed. 769.

A statute imposing absolute liability upon railroad companies for all property injured or destroyed by fire from its locomotives and giving it an insurable interest in the property and its protection does not deprive the railroad companies of its property without due process of law or deny the equal protection of the law.

St. Louis & S. F. Railway Company v. *Mathews*, 165 U. S. 1, 17 S. Ct. 243, 41 L. Ed. 611.

This Court has also held:

> "There is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the state in the exercise of its police powers." *Detroit Ft. Wayne and Belle Isle Railway* v. *Osborne*, 189 U. S. 383, 23 S. Ct. Rep. 540, 47 L. Ed. 860.

Classifications of railroads on the basis of length for the purpose of fixing rates and also for the pur-

pose of regulating equipment required have been sustained by this Court as valid. *New York etc. R. Co.* v. *New York,* 165 U. S. 628, 17 S. Ct. Rep. 418, 41 L. Ed. 853; *Dow* v. *Beidelman,* 125 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. Ed. 841.

This Court has even gone so far as to hold constitutional an act imposing a penalty upon railroad companies permitting Johnson grass to grow to seed on their right of way, when the adjoining land owner does not permit such grass to grow to seed on his property when the act did not apply with equal force to another adjoining land owner who was not a railroad company. *Missouri K. & T. R. Co.* v. *May,* 194 U. S. 267, 24 S. Ct. 638, 48 L. Ed. 971.

> "In *Missouri P. Ry. Co.* v. *Mackley,* 127 U. S. 205, 32 L. Ed. 107, the law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification notwithstanding that it did not apply to other carriers or even to other corporations using steam." *Orient Insurance Company* v. *Daggs,* 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. Ed. 552.

In the case last quoted from a statute of Missouri affecting fire insurance companies but not extending in its operation to other insurance companies was sustained, the Court holding that the classificaton was not arbitrary.

The fact that the act does not apply to the small "dummy" lines which serve to haul logs into sawmills, ore from mines to refineries, etc., is not an un-

reasonable classification. The Court judicially knows that the use of these private enterprises is essentially different from the use of the common carrier railroad lines, that the speed of the traffic and the nature of the traffic is essentially different and that they occupy entirely different positions in the economic structure of the state, and we submit that the Legislature of Florida is entirely within the legitimate exercise of its police power in making the classification different.

The Legislature of the State of Florida has seen fit to recognize the manifest differences between the operation of railroad trains and the operation of motor vehicles, and has enacted laws regulating the operation of motor vehicles, upon the public highways of the state, affecting the age of operators, (1290) C. G. L. 1927, brakes (1294) C. G. L. 1927, lights (1294, 1319) C. G. L. 1927, height of vehicle with load (1296) C. G. L. 1927, passing other vehicles (1296) C. G. L. 1927, conduct at railroad crossings (1324) C. G. L. 1927, reckless operation (1296) C. G. L. 1927, the side of road upon which the vehicle must be driven (1296) C. G. L. 1927, the speed of the vehicle (1296) C. G. L. 1927, stopping on public highways (1320), C. G. L. 1927, the width of the vehicle with load (1296) C. G. L. 1927, etc., thus manifestly protecting the public safety by regulations different from those deemed necessary to protect the public from injuries resulting from accident at railroad crossings.

In 1929, the Legislature of the State of Florida enacted Chapter 13700, regulating the use of the public highways by common carriers providing for supervision by the Railroad Commission and making such other regulations as the public good, in the opinion of the Legislature, required. In 1931, Chapter 14764 was enacted, which regulates more particularly and more strictly the use of the public highways of Florida, by common carriers using motor vehicles as a means of transportation.

That the Legislature of the state may recognize differences between different modes of transportation and so classify them as in the Legislative judgment is best for the public good, and this does not deprive the carrier of one type of the equal protection of the law, nor deprive it of its property without due process of law.

Savannah T. & I. of H. Railway v. *Savannah*,
198 U. S. 392, 25 S. Ct. 690, 49 L. Ed. 1097.

The appellant argues that because both are common carriers the same rule of liability must apply, regardless of the fact that the means of transportation, the essential nature of the methods employed in conducting the business, and the relationship of the vehicle used to the traveling public not employing the carrier, and denies the right of the Legislature to classify different modes of conducting the business of the common carriers, we submit that the appellant has failed to meet the burden of showing that the classification complained of does not rest upon any reasonable basis or that it is essentially arbitrary

and on the contrary we submit that it is obvious from a consideration of the question that the classification is essentially reasonable and just and is based upon essential differences in the classes referred to, which the Legislature of Florida was within its constitutional powers in recognizing in the performance of its duties in regulating the subjects of the classifications.

THIRD POINT OF LAW.

Does the Statute as Construed by the Supreme Court of the State of Florida, the Court of Last Resort in Said State, Illegally Impose upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Throughout the Trial of Any Cause in Which It Is Invoked That Is Not Cast upon Other Litigants?

Assignment of errors Nos. 5, 6, 7, 8, 9 and 12:

Under the appellant's third point of law, various excerpts from the charge of the Court are attacked. The arguments presented are all within the rule discussed under the first point of law and a determination of the question raised under the first point of law determines the question raised here.

As above pointed out, the question that presents itself to the Court is whether the case at bar, taking into consideration the construction of the statute by the state court which this Court will adopt, and the charge to the jury under this construction of the statute, falls within the rule laid down in the Henderson case, or whether it falls within the rule laid down in the Turnipseed case. If the Court be of the opinion that the Henderson case is applicable, then the appel-

lant's contention must be sustained and the Supreme Court of Florida must be reversed. If, however, the Court is of the opinion as we have argued in prior pages of this brief that the rule laid down in the Turnipseed case is the one properly applicable here, then the case, we submit, should be affirmed by this Court.

In considering the charge of the Court we can not rely upon mere excerpts selected at random or take those portions most favorable to one litigant and disregard those portions most favorable to the other litigants but the charge must be taken and considered as a whole and, when so considered, we submit that the appellant has not shown that in this case it has been deprived of any constitutional right or that any guarantee of the constitution has been denied it. Our position on the questions here presented has been fully outlined in the argument under the first point of law, and we respectfully refer the Court to that argument, rather than burden the Court with a repetition of the same statement under this heading of our brief.

FOURTH AND FIFTH POINTS OF LAW.

Fourth.

Did the Refusal of the Trial Court Because of the Statute in Question, Sustained by the State Appellate Court, to Give the Second Charge Requested by the Defendant Which Invoked the Rule Laid Down by This Court in the Goodman Case, Supra, Deprive Appellant of Its Process of Law and the Equal Protection of the Law?

And

FIFTH.

Did the Refusal of the Trial Court, Sustained by the State Appellate Court, to Give the Third Charge Requested by the Defendant Which Invoked the Same Rule of Law Deprive Appellant of Any Constitutional Right?

Assignment of errors Nos. 10 and 11:

As heretofore pointed out in the case of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24,

was not decided by the Court upon any constitutional question but seems to have been decided upon a question of law of negligence. The case originated and proceeded throughout its history in the federal courts. No question of constitutional law seems to have been raised by either party, and we submit that it has no application to the case at bar except as it may lay down a rule of law as to negligence.

Since in the present case this Court can only consider constitutional questions, as its appellate jurisdiction from a decision of the Supreme Court of a state is limited to a determination of a federal question, we submit that no ground for federal jurisdiction is shown to appear and that the Court should not consider any argument by the appellant under this point of law. However, the Court did in fact charge the jury in substantial compliance with the rule laid down in the Goodman case (R. 38). The charge given substantially states the law as laid down in the Goodman case and the instruction refused, made the basis of the tenth

assignment of error, was properly refused since the point had been covered in the general charge.

The third charge requested, made the basis of the eleventh assignment of error, is clearly bad in that it assumes a fact which was in issue to have been proven, to-wit: that the plaintiff's servant was negligent, and the Court should not have assumed the proof of a fact in litigation.

Conclusion.

In conclusion, we respectfully submit that this Court should not reverse the Supreme Court of Florida unless the appellant has made it appear that in this particular case it has been deprived of some constitutional right and that the loss of such right has resulted in its damage.

We believe that we have demonstrated to the Court that no constitutional right of the appellant has been violated, and we respectfully submit that the decision of the Supreme Court of Florida should be affirmed by this Court.

Respectfully submitted,

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